

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7547-E
)	
Petition for Determination of Effective)	
Competition in 8 Communities in New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 2008

Released: August 15, 2008

By the Associate Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act")¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). The petition is opposed by the Division of Rate Counsel of the New Jersey Board of Public Utilities (the "DRC"), which filed a pleading referred to hereinafter as "Comments."³ Petitioner filed a "Reply."

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ For the reasons set forth below, we grant the petitions as to the 5 Communities listed on Attachment B based on our finding that Petitioner is subject to effective competition in them, and we deny the petitions as to the 3 Communities listed on Attachment C.

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(2).

³Comments of the New Jersey Division of Rate Counsel in Opposition to Time Warner's Petition for a Declaration of Effective Competition.

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

A. Statutory Standards

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁷ This test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁸ The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.⁹

1. The First Prong of the Competing Provider Test

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹⁰ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹¹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this petition with citations to the channel lineups for both DIRECTV and Dish.¹³ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁴ Accordingly, we find that the first prong of the competing provider test is satisfied.

⁷47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸47 C.F.R. § 76.905(b)(2)(i).

⁹47 C.F.R. § 76.905(b)(2)(ii).

¹⁰*See* Petition at 3-4.

¹¹*Mediacom Illinois LLC*, 21 FCC Rcd 1175 (2006).

¹²*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

¹³*See* Petition at 4.

¹⁴*See id.* at 7.

2. The Second Prong of the Competing Provider Test

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts, and the DRC does not dispute, that it is the largest MVPD in the Communities.¹⁵

a. Data Submitted by Petitioner

7. Petitioner sought to determine the subscribership of the DBS providers in the Communities by using, and filing with the petition, several kinds of data. These are: U.S. Postal Service data about the number of households in each five-digit zip code that is associated with one or more of the Communities;¹⁶ U.S. Census Bureau data showing the number of households in each Community as recorded in the 2000 Census;¹⁷ and a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) identifying the number of subscribers that the DBS providers have in each above-mentioned zip code.¹⁸ From this data, Petitioner performed various calculations to estimate whether the subscribership of the DBS providers exceeds 15 percent in each Community.¹⁹ Petitioner also filed data showing its own subscribership in each Community.²⁰

b. Petitioner’s Erroneous Data

8. Petitioner’s data showing its own subscribership and that of the DBS providers shows that, in three Communities (Englewood, Ridgefield, and Teterboro), their combined subscribership exceeds 100 percent of the households.²¹ In one of these Communities (Teterboro), Petitioner’s data shows its own subscribership alone exceeding 200 percent of the households.²² This data is obviously inaccurate and unreliable. It may be that the excessive subscribership totals result from the combined application of very small populations (in Teterboro there are only seven households) and five-digit zip codes that cover large areas and many households outside the franchise area. Whatever the reason, we cannot disregard these inaccuracies, which Petitioner should have corrected before filing or brought to our attention, because they undermine the reliability of the five-digit zip code data in these instances. We recently released a Public Notice providing that if a petitioner’s five-digit zip code data leads to inaccurate or questionable reports of penetration, the request will be denied without prejudice to re-file using nine-digit “zip code plus four” data.²³ Accordingly, we deny the petition as to the three Communities, which are listed in Attachment C hereto, without prejudice to their being re-filed with calculations based on nine-digit zip code plus four data.

¹⁵ *Id.* at 7.

¹⁶ *Id.* at Exh. B.

¹⁷ *Id.* at Exh. C.

¹⁸ *Id.* at 8 n.23 & Exh. D.

¹⁹ *Id.* at Exh. E.

²⁰ *Id.* at Exh. A.

²¹ *Compare id.* at Exh. A with Exh. E.

²² *Id.* at Exh. A.

²³ Public Notice, *Commission Announces New Standards for Showings of Effective Competition for Cable Service*, DA 08-1892 at 2, released August 13, 2008.

c. The DRC's Objections

9. The DRC makes several objections to how Petitioner uses the data described in paragraph 7 above to show that DBS subscribership in particular Communities is in excess of 15 percent. We disregard the objections concerning two Communities, Ridgefield and Teterboro, in which we above found fatal flaws in Petitioner's data.²⁴

10. The DRC objects that two kinds of data used by Petitioner – from the Postal Service and the Census Bureau, both estimating numbers of households – show different numbers of households in the same Community and are therefore contradictory and unreliable.²⁵ This objection misunderstands the data, however. The Postal Service data states that there are 22 households in a certain zip code labeled “Moonachie.”²⁶ and the Census data shows that there are 1,041 households in the Borough of Moonachie.²⁷ It appears that the Postal Service names a certain zip code “Moonachie” simply for ease of reference and because the zip code overlaps the Borough of Moonachie to some extent. The Postal Service's number shows how many households are in the zip code; it does not purport to show how many households are in the Borough of Moonachie.²⁸ Only the Census Bureau's number does that. The data, therefore, are not contradictory and unreliable.

11. Second, the DRC objects that Petitioner, in estimating DBS subscribership in a Community, several times includes DBS subscribers in zip codes named after other Communities. The DRC appears to believe that this may result in DBS subscribers in some zip codes being counted as living in two Communities, thus overstating DBS subscribership in one of them.²⁹ The DRC correctly describes what Petitioner has done, but is mistaken in believing that any double counting necessarily results from it. Precisely because, as described above, zip code and Community boundaries often do not coincide,³⁰ it is not surprising that one zip code can span two or more Communities and contain DBS subscribers in all of them. To prevent double counting, Petitioner uses a method to allocate DBS subscribers in such zip codes among the Communities it spans.³¹ This method is one that we have allowed in previous decisions.³² The DRC has not shown that Petitioner's allocation method results in any double counting and over-estimation of DBS subscribership in any Community.

12. Third, the DRC objects that Petitioner has overstated the number of DBS subscribers in the Borough of Ridgefield as 2,364 although the actual number is 502.³³ The DRC is mistaken, however. 2,364 is SBCA's estimate of the number of DBS subscribers in a total of three zip codes labeled

²⁴Comments at 5 (alleging 2 different numbers of households in Teterboro).

²⁵*Id.* at 5.

²⁶Petition at Exh. B.

²⁷*Id.* at Exh. C.

²⁸In a similar misunderstanding, the DRC (Comments at 6 & n.15) mistakes the Postal Service's estimate of the number of households in 3 zip codes called Ridgefield (Petition at Exh. B) for the Census's number of households in the Borough of Ridgefield (Petition at Exh. C).

²⁹Comments at 5-6 (claiming, for example, that zip codes associated with Little Ferry are used to estimate DBS subscribership in both Little Ferry and Moonachie).

³⁰Reply at 2-3.

³¹*Id.* at 3, 6.

³²Reply at 2; *see, e.g., Time Warner Cable Inc., & Time Warner Entertainment-Advance/Newhouse Partnership*, 23 FCC Rcd 6805 (2008); *Time Warner Cable, Inc.*, 23 FCC Rcd 8499 (2008); *Time Warner Cable Inc., & Time Warner Entertainment-Advance/Newhouse Partnership*, 23 FCC Rcd 7371 (2008).

³³Comments at 6.

Ridgefield; 502 is the number of DBS subscribers in one of those zip codes.³⁴ Neither of those numbers is Petitioner's estimate of the number of DBS subscribers in the Borough of Ridgefield, and neither is part of Petitioner's final calculation of DBS subscribership there.

13. Fourth, the DRC objects that the kinds of evidence by which Petitioner attempts to satisfy the second prong of the competing provider test – Postal Service and Census Bureau data about households and DBS subscribership data – have not been approved by the full Commission.³⁵ Commission approval, however, is not necessary for any or each kind of evidence that cable operators use. The Commission has adopted rules³⁶ that flesh out the statutory criteria enacted by Congress in 623(l) of the Communications Act³⁷ without specifying the kinds of evidence that may be submitted to satisfy those criteria in individual petitions. Nothing cited by the DRC or known to us requires that the Commission go farther and specify such evidence.

14. Fifth, the DRC objects that Petitioner has not shown that SBCA's estimates of DBS subscribership do not include commercial accounts and test accounts.³⁸ In fact, however, Petitioner's Exhibit D specifically states that "commercial and test accounts are not included"³⁹ in its DBS subscriber counts and we see no reason to doubt that statement.

15. Sixth, the DRC objects to Petitioner showing DBS penetration in excess of 15 percent by a ratio consisting of household data from 2000 and DBS subscribership data from 2007. The DRC asks us to require that household and subscribership data be contemporaneous with each other and current as of the filing date and that such data be contained in the petition.⁴⁰ We decline to do so. In many cases, including ones about the State of New Jersey, we have found competing provider effective competition to exist based on household and DBS subscribership data that are years apart in time.⁴¹ We have also stated that we would accept household data that is more recent than, and as reliable as, the most recent Census data.⁴² The DRC has offered no such data in this proceeding, however, and has given us no reason to depart from our precedent. Accordingly, we find no fatal flaw in the timeliness of the data submitted by Petitioner.

³⁴Petition, Exh. D.

³⁵Comments at 4-5.

³⁶47 C.F.R. §§ 76.905 to .907.

³⁷47 U.S.C. § 543(l).

³⁸Comments at 6-7. The DRC also mentions "non-residential locations," but we understand these to be the same as commercial accounts.

³⁹Petition, Exh. D.

⁴⁰Comments at 8.

⁴¹*Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11493, ¶ 16 (2007) ("The Commission has relied upon Census data in effective competition cases where the differential between the dat[e] of the Census information and the date of the petition was greater than five years"); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004) ("We find that the Ratepayer Advocate's arguments are without merit. The Commission has held that 2000 Census data is sufficiently reliable for effective competition determinations"); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71, ¶ 8 (2003); *Jones Intercable, Inc.*, 15 FCC Rcd 7254, 7256, n.12, ¶ 5 (2000) (using 1990 Census despite the fact that it was nearly a decade old); *Tel-Com, Inc.*, 11 FCC Rcd 9153, 9158-59, n.36, ¶ 11 (1996) (1996 decision using 1990 Census data).

⁴²See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 08-1658 at ¶ 12 (rel. July 15, 2008), available at 2008 WL 2743906; *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 08-1270 at ¶ 10 (rel. May 30, 2008), available at 2008 WL 2229735; *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007).

16. Finally, the DRC objects that the petition did not include Petitioner's "supporting analysis and work papers."⁴³ In fact, the Petition's various exhibits described above contain all the raw data that Petitioner used and all the calculations it made with that data to show the existence of competing provider effective competition.⁴⁴ The DRC reveals no flaw in this data and calculations and gives no indication of what petitioner's additional supporting analysis and work papers, assuming that there are any, would add to the record before us.

d. Conclusion

17. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,⁴⁵ as reflected in Attachment B, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities listed on Attachment B. Therefore, the second prong of the competing provider test is satisfied for each of the Communities listed on Attachment B.

18. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment B.

3. Miscellaneous

19. The DRC observes that the Commission has rules requiring the payment of fees in connection with the petition and the listing of franchise areas in the petition.⁴⁶ Because the DRC does not allege, much less substantiate, any specific violation of those requirements by Petitioner, we find no significance in its observations.

20. Petitioner refers to the fact that in New Jersey, typically it is the New Jersey Board of Public Utilities (the "BPU"), rather than local government entities, that regulates cable service.⁴⁷ We observe that the words we use in paragraph 22 below – revoking "the certification to regulate basic cable service rates granted *for* any of the Communities set forth on Attachment B" – revoke the authority to regulate rates for basic cable service for any of those Communities, whether that authority rests in an individual municipality, the BPU, or other New Jersey regulatory unit.

⁴³Comments at 5, 7.

⁴⁴Petition, Exhs. B-E; *see also* Reply at 7.

⁴⁵*Id.* at Exh. C.

⁴⁶Comments at 1 n.1.

⁴⁷Petition at 1 n.2; N.J.S.A. 48:5A-2(d), 9(b).

II. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **ARE GRANTED** as to the Communities listed on Attachment B and **ARE DENIED** as to the Communities listed on Attachment C.

22. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted for any of the Communities set forth on Attachment B **IS REVOKED**.

23. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁸

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy
Associate Chief, Media Bureau

⁴⁸47 C.F.R. § 0.283.

ATTACHMENT A**CSR 7547-E****ALL COMMUNITIES SERVED BY TIME WARNER CABLE INC.**

Communities	CUID(S)
Englewood	NJ 0251
Fairview	NJ 0253
Guttenberg	NJ 0338
Little Ferry	NJ 0339
Moonachie	NJ 0427
Ridgefield Park	NJ 0254
Ridgefield	NJ 0203
Teterboro	NJ 0484

ATTACHMENT B**“COMPETING PROVIDER” COMMUNITIES - GRANTED****CSR 7547-E****COMMUNITIES SERVED BY COMMUNITIES SERVED BY TIME WARNER CABLE INC.**

Communities	CUID(S)	CPR*	2000 Census Households	Estimated DBS Subscribers
Fairview	NJ 0253	22.94%	9273	1115
Guttenberg	NJ 0338	19.58%	4493	880
Little Ferry	NJ 0339	18.27%	4366	798
Moonachie	NJ 0427	18.35%	1041	191
Ridgefield Park	NJ 0254	15.86%	5012	795

CPR = DBS penetration or subscribership

ATTACHMENT C**“COMPETING PROVIDER” COMMUNITIES - DENIED****CSR 7547-E****COMMUNITIES SERVED BY TIME WARNER CABLE INC.**

Communities	CUID(S)	Time-Warner Subscribership+	CPR*	2000 Census Households	Estimated DBS Subscribers
Englewood	NJ 0251	86.68%	15.35%	9273	1424
Ridgefield	NJ 0203	89.90%	17.43%	4020	701
Teterboro	NJ 0484	214.29%	36.36%	7	3

+ = See Petition, Exh. A; in these Attachments, numbers of DBS subscribers are rounded off.

CPR = DBS penetration or subscribership